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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 314

FAIRMONT GLASS WORKS,
Petitioner,

v.

CUB FORK COAL COMPANY and
PARAGON COLLIERY COMPANY,
Respondents.

BRIEF FOR RESPONDENTS

CONNOR HALL, Esq.,
Counsel for Petitioner.

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STATEMENT

In the trial in the District Court the jury found a verdict for the plaintiff upon breach of contract for the sale and delivery of coal and assessed the damages at one dollar. The evidence as to the amount of the undelivered coal and the market price at the times fixed in the contract for delivery was uncontradicted. The Circuit Court of Appeals, in its opinion, said: "Appellee breached its contract without justification on December 4, 1920. The market price of coal is shown for

each day of the month, and the average price per month is also disclosed, so that the actual amount of damage is quite definitely ascertainable. There is a slight discrepancy in the statements of witnesses who testified as to the market value of the coal. One witness, for example, placed the value of such coal in April at $2.60 to $2.70, whereas another witness placed it at $2.75 and another placed it at $2.90. This was the widest difference of opinion appearing in the entire record. There is also a difference in the testimony respecting the amount shipped and the amount received. This diffrence was due apparently to the fact that the railroads confiscated a small amount of the coal on several occasions.

"Against appellants' damages, appellee sought to recover its alleged damages for appellants' failure to deliver the tonnage specified for the months of July, August and October. The market value for coal for these months is likewise not in serious dispute. The contract called for the delivery of a total of 7,000 tons during the first five months. 6,638.95 were shipped.

"It is evident that on any hypothesis appellants were entitled to recover over $18,000. The jury fixed the damages at $1. The verdict should have been set aside and a new trial ordered on appellants' motion.

"United Press Assn. v. Nat. Newspapers Assn., 254 Fed. 284;
Pugh v. Bluff City Excursion Co., 177 Fed. 399;
Stetson v. Stindt, 279 Fed. 209;
James v. Evans, 149 Fed. 136;
Glenwood Irrigation Co. v. Vallery, 248 Fed. 483;

Smith v. United States, 281 Fed. 696."

The District Judge charged the jury (page 121) that the measure of damages was the difference between the contract price and the market price at the time of breach. Counsel for the respondents (pages 122, 123) called his attention to the error in the charge and requested that he instruct the jury that the measure of damages was the difference between the contract price and the market price, not at the time of breach as he charged, but at the times fixed in the contract for delivery. The colloquy between the court and counsel will be found as indicated on pages 121, 122 and 123. The breach as shown by the evidence and found by the Circiut Court of Appeals occurred on December 4, 1920. The coal which remained undelivered under the contract was to be delivered in equal monthly installments in the month of December, 1920, and in the first six months of the year 1921. The difference between the market price and the contract price (page 42) in December was ($.75) seventy-five cents—in January ($2.35) two dollars thirty-five cents—in February ($3.00) three dollars and in each of the months of April, May and June ($3.75) three dollars seventy-five cents.

PROPOSITIONS OF RESPONDENTS

I. **The judgment of the Circuit Court of Appeals reversing the judgment of the District Court is right without regard to any question as to whether the order denying a new trial is appealable;** for,

(A) the judgment appealed from may be sup-

ported upon grounds not considered and reasons not assigned by the Circuit Court of Appeals. **Langnes v. Green,** 282 U. S. 531, 538; **Story Parchment Co. v. Paterson Co.,** 282 U. S. 555, 560; and

(B) the charge of the District Court was plainly erroneous in instructing that the measure of damages was the difference between the contract price and the market price at time of breach instead of (as is the correct rule) the time of delivery. **U. S. v. Burton Coal Co.** 273 U. S. 337, 340. This error was a natural and material inducement to the mistake of the jury in finding damages of only one dollar.

II. But the order refusing a new trial was appealable. There was not involved any re-examination of facts, but merely a review of a matter of law. The finding of one dollar damages was arbitrary, not supported by evidence, but contrary to all the uncontradicted evidence of disinterested witnesses; and the setting aside of such verdict is not a matter of discretion but of law. **Mills v. Scott,** 9 Otto 25, 30; **Railroad Co. v. Frailoff,** 100 U. S. 24, 31, 32; **Wabash Railway Co. v. McDaniels,** 107 U. S. 454, 456, 463; **Insurance Company v. Folsom,** 18 Wall, 237, 252; **St. Louis & Iron Mountain Railway Company v. Craft,** 237 U. S. 648, 661; **Pleasants v. Fant,** 22 Wall 116, 120, 121; **Metropolitan Railroad Co. v. Moore,** 121 U. S. 558, 567, 568; **Louisville, etc. Railroad Co. v. Woodson,** 134 U. S. 614, 623; **Walker v. Southern Pacific R. R.,** 165 U. S. 593; 596; **Atcheson, etc., R. R. Co. v. U. S.** 284 U. S. 248, 262; **James V. Evans, 149 Fed.,** 136, 141;

Pugh v. Bluff City Excursion Co., 177 Fed. 399; **Stetson v. Stindt,** 279 Fed. 209; **Glenwood Irrigation Co. v. Vallery,** 248 Fed. 483; **Smith v. U. S.** 281 Fed. 696.

III. **The judgment of the District Court being subject to reversal, the Circuit Court of Appeals in limiting the new trial to damages followed the practice sanctioned by this court. Gasoline Products Co. v. Champlin Refining Co.,** 283 U. S. 494.

ARGUMENT

Counsel for petitioner base their case upon the ground that the order of the District Court denying a new trial is not appealable, and that therefore the Circuit Court of Appeals in finding this to be error exceeded its power. We will discuss this question later. The judgment of the Circuit Court of Appeals is to be supported without any necessary consideration of this question. The jury, as we have seen, found for the respondents, (plaintiffs in the District Court), but assessed damages for only one dollar. Such mistake was doubtless induced by the erroneous charge of the court. In **Langnes v. Green,** 282 U. S. 531, 538, this court said, "Respondent here defends that decree upon the ground upon which it was based, and, in addition, continues to urge the rejected ground, not to overthrow the decree, but to sustain it. His right to do so is beyond successful challenge, quite apart from the fact that this is a proceeding in admiralty." Likewise in **Story Parchment Co. v. Paterson Co.,** 282 U. S. 555, 560, it was said, "Respondents seek to sustain this judgment upon that ground and also upon the additional ground, which the lower court found against them,

that there was no evidence of a conspiracy or combination to monopolize interstate trade. Because there was no cross-petition for certiorari, petitioner insists that the additional ground is not open here for consideration. But respondents do not invoke that ground in order to overthrow the judgment below, but to sustain it; and this they may do."

The District Court, as we have seen (pages 121, 122, 123) charged that the measure of damages for the breach by the defendant for the contract to take coal was the difference between the contract price and the market price at the time of breach. The correct rule as laid down by this Court is, of course, the difference between the contract price and the market price not, as charged by the Court, at the time of the breach, but at the time fixed in the contract for delivery. In **U. S. v. Burton Coal Co.,** 273 U. S. 337, 340, the Court said, "The coal had a market value and it was less than the contract price. The applicable measure of damages is fixed by the rule of law that, where a buyer in violation of an executory contract of sale refuses to accept the commodity sold, the seller may recover the difference between the contract price and the market value at the times when and the places where deliveries should have been made." This was not only a very plain, but also a prejudicial error. The breach occurred on December 4, 1920. The times fixed for delivery were the month of December, 1920, and the first six months in the year 1921, in equal monthly installments. Now, the difference between the contract price and the market price in December, the time of the breach, was ($.75) seventy-five cents. The difference in the subsequent months in which delivery was to be made was as fol-

lows: January ($2.35) two dollars thirty-five cents; February ($3.00) three dollars; March ($3.50) three dollars fifty cents, and for each of the months of April, May and June, ($3.75) three dollars seventy-five cents (page 42). For this reason alone the judgment of the District Court was liable to reversal, and can in no event be affirmed; but on the contrary the judgment of the Circuit Court of Appeals for this reason, if for no other, is to be supported.

But the order of the District Court denying a new trial was not the exercise of such discretion as to be beyond review by the Circuit Court of Appeals. There was not involved any re-examination of facts. The verdict of the jury finding only one dollar damages was not only unsupported by evidence, but was contrary to the whole of the evidence introduced upon this point, uncontradicted evidence of disinterested witnesses. The only witnesses testifying as to the market price of the coal were I. F. Vass (page 42), M. L. Burtless (page 51), Walter L. Tetman (page 50) and Milton M. Tyree (page 52). The Circuit Court of Appeals in its opinion took the highest market price stated by any of these witnesses, found the difference between that and the market price and from this deducted upon the counterclaim of the defendant its damages calculated upon the lowest market price, thus giving to the petitioner the benefit of all differences and of all doubts. The result showed damages to the respondents in excess of $18,000.00 without counting interest. It is thus seen that the finding of damages of only one dollar was plainly arbitrary. Only one of these witnesses, Mr. Vass, had any interest in the case.

The question whether an order denying a new trial is reviewable may properly be divided into two parts: first, that of constitutional power and secondly as a mere rule of practice.

Now, as far as constitutional power is concerned, there is little difficulty. The constitution merely forbids a re-examination of facts found by a jury otherwise than according to the course of the common law. So far as constitutional power is concerned, that merely means that the right of trial by jury shall be preserved. But this does not mean that a jury must decide a case unless there be evidence to support it. It has, of course, long been settled that the Court is not obliged to submit every case to a jury even though there be a scintilla of evidence. If there be no substantial evidence to support the plaintiff's action or the defendant's defense, the duty of the Court is to instruct the jury to return a verdict in accordance with the court's opinion. This demonstrates that the seventh amendment does not give any right to an abritrary, unbridled decision by a jury. In fact, under our system of government, there is no place for an arbitrary finding even by administrative bodies in which the largest discretion is reposed. Thus, in **Atcheson, etc. v. U. S.**, 284, U. S. 248, 262, this court said, "We think that this action was not within the permitted range of the commission's discretion, but was a denial of right."

So far as the ordinary rule against reviewing an order denying a new trial is a rule of practice, there is at bottom equally little difficulty. Rules of practice in the Federal Courts are not straight-jackets—they are not masters, but servants and guides. Generally it is

entirely proper that an order granting or denying a new trial should not be reviewable, for ordinarily a party has other opportunities of preserving his rights. If improper evidence should be admitted, or proper evidence be rejected, if the charge of the Court be erroneous, if there be not sufficient evidence to support an action or a defense, a party may in the course of the trial take his exceptions. This applies to everything occurring up to the time the case is submitted to the jury. But for an arbitrary finding or palpable mistake of the jury in reaching its verdict, a motion for a new trial is all that is left, and if, as here, the mistake is plain and the finding unsupported, the setting aside of such verdict is not a matter of discretion. A party has the right to have his case decided not by caprice, but according to the law of the land, and if he is deprived of such right and has no opportunity to make his objection except by a motion for a new trial, and that be denied, he should then have the judgment of an Appellate Court.

In **James v. Evans,** 149 Fed. 136, 141, it is said that the ruling of the trial court upon the motion for a new trial if based upon an erroneous view of the law, amounts to an abuse of discretion and is reviewable.

In **Pugh v. Bluff City Excursion Co.** 177 Fed. 399, the Circuit Court of Appeals for the Sixth Circuit reviewed and reversed the refusal of the lower court to grant a new trial where the jury found for the plaintiff and fixed the damages of one dollar for the death of a son twenty-nine years of age and in good health.

In **Stetson v. Stindt,** 279 Fed. 209, it is held by the Circuit Court of Appeals for the Third Circuit that a

finding for the plaintiff, but for only part of the damages shown by uncontroverted evidence, is contrary to the law, and if the trial court refuses to set aside such a verdict its action is reviewable.

In **Glenwood Irrigation Co. v. Valery,** 248 Fed. 483, it is held by the Circuit Court of Appeals for the Eighth Circuit that a finding for the plaintiff, but for only part of the damages clearly recoverable, is an error of law, and the action of the trial court thereon is reviewable.

In **Smith v. United States,** 281 Fed. 696, the Circuit Court of Appeals for the Fourth Circuit reviewed and reversed the action of the trial court in refusing to grant a new trial.

In **Pugh v. Bluff City Excursion Co.** cited above, the Circuit Court of Appeals for the Sixth Circuit said:

"It is the general rule that the granting of a new trial is a matter of discretion, and will not be reviewed. But it is not so where the verdict is inconsistent on its face and shows the abuse of power on the part of the jury. If the granting of the motion is a positive duty, it is not discretionary. If it is necessary to correct a mistrial, it becomes a positive duty to set aside the erroneous proceeding and grant a new trial. And such, we think, was the case here. The jury found the plaintiff was entitled to recover. And if she was, it was absurd to say that she was entitled to only nominal damages. The conclusion seems unavoidable that the verdict was simply a compromise to prevent a disagreement. Its effect was to cut off the plaintiff from her privilege of

having another trial if the jury were unable to agree upon the question of her right to recover. And upon the new trial to which she was entitled, she might be able to satisfy the jury that she was entitled to recover upon the merits of the action and have substantial damages."

In **Stetson v. Stindt,** cited above, the Circuit Court of Appeals for the Third Circuit said:

"The third is based on the broad proposition of law that a verdict which is contrary to the law of the case or which is not sustained by evidence in the case must be set aside. On this general law some courts have squarely met the question and have held that an instruction on the measure of damages is an instruction on the law, that a verdict by the jury in disregard of such instructions calls for a new trial, and that, under the circumstances, refusal by the trial court to grant a new trial constitutes reversible error.

"We are persuaded by the ratio decidendi of the last line of authorities that a verdict like the one under consideration, which is perverse and directly violative of the charge of the court and is wholly without evidence to support it, cannot stand. It is not sufficient to say that the defendant cannot complain because he was not injured. He was injured by being deprived of the right of a litigant to have the jury determine his liability under the law as laid down by the court. That liability might be for more than the jury found; yet it might be for nothing. What his liability is, the jury refused to say; but said something else, which, under the law and on the facts, was simply untrue. Therefore,

we are of opinion that the verdict was invalid and that the court erred in entering judgment upon it. Whether this error is reversible depends on the next question.

"The defendants in error make the point that a question of error entering judgment on the verdict, even if invalid, is not before this court because that question was decided with finality by the trial court on the motion for a new trial, resting on the principle, too well established to require authority, that the granting or refusing of a new trial is a matter of discretion by the trial court, with the exercise of which an appellate court will not interfere.

"This rule, invariable in its operation, is by its terms applicable where the dicretion of the trial court is invoked with reference to a matter open to its exercise. It was conceded in this case that the verdict was opposed to the court's instruction on the law. Also, there was no question whether the verdict was right or wrong. Admittedly, it was wrong. It did not require exercise of discretion to arrive at this conclusion. Everyone agreed to it. Therefore, the duty of the court not to enter judgment upon a verdict unlawful because rendered in opposition to its instruction was one of law. **United States v. Routt County Coal Co.**, 248 Fed. 483, 485, C. C. A. 495. In the performance of that duty the learned trial judge was not called upon to determine a question with respect to which no strict rule of law is applicable, but he was called upon to enforce a fixed rule. His duty was quite imperative. Nor did the learned trial judge, in entering judgment on the verdict in this case, do so within a discretion which he brought into exercise. What he did was to interpret

the law and thereupon to perform the duty of applying the law as he had interpreted it. As we have been constrained to find error in his interpretation of the law, it follows necessarily that error was involved in its application."

It thus appearing that the judgment of the District Court being subject to reversal for both of the reasons assigned above, the Circuit Court of Appeals acted properly in limiting the new trial to damages alone. **Gasoline Products Co. v. Champlin Co.** 283 U. S 494. It was especially proper here. The jury had found the issues in favor of plaintiff, but assessed damages at only one dollar. This mistake, as we have seen, was induced by the erroneous charge of the court upon the measure of damages.

In fact, the defendant had no substantial defense to the action of the plaintiffs. That it had committed a breach of the contract was determined upon prior appeal, 33 Fed. (2nd) 420. The only defense that it could claim should have been submitted to the jury, upon the trial now under consideration was that the W. E. Deegans Coal Company represented that it was the owner of the mines, whereas in fact they were owned by the respondents. The W. E. Deegans Coal Company was the sales organization of the respondents. W. E. Deegans owned a majority of the stock of all three companies (page 58), and he, together with his partner, J. B. Hoffmeier, Mrs. W. E. Deegans, Jack Faulkner and O. C. Huffman, owned substantially all the stock of all three companies. (Pages 40, 41, 46, 54 and 58.)

The undisputed written correspondence shows that

the defendant had prior to the date of the alleged misrepresentation fully determined to enter into the contract and that the alleged misrepresentations, as a matter of law, did not induce the defendant to do anything which it would not otherwise have done.

The defendant had had a contract with the plaintiffs for the furnishing of coal for the year previous. This contract was to expire in July, 1920. On July 7, 1920, (page 78) the defendant Glass Works through John Rau, its president, wrote the W. E. Deegans Coal Company at Huntington, calling attention to the fact that he had a few days previously written: "In reference to a contract for our next year's coal supply on the same kind of coal that we have been getting this year." He asks the Deegans Company to name a price and continues: "We are very anxious to know as soon as possible just what you intend to do for us on next year's coal supply. We will have to know as soon as possible and the best price." On July 10 (page 78) the W. E. Deegans Coal Company answered this letter saying that Mr. Deegans who had charge of the operating companies, was out of the city, but would return and that Mr. Rau would be advised. On the 12th (page 79), The Glass Works through its president, again wrote urging that he be given some word as soon as possible, among other things saying: "We would like to know as soon as possible what you intend to do about furnishing us with coal for next season. We are needing coal badly and must have this information promptly. If we are not going to get coal from your company, we must get coal elsewhere, and we hope you will give us an answer as soon as possible." On July 14 (page 80) the W. E.

Deegans Coal Company sent a telegram to the defendants as follows: "Will contract your requirements egg coal at six fifty net ton mines subject condition in letter today." In a letter of the same date (page 80) the conditions referred to are stated, that Mr. Deegans has been negotiating for the sale of the property and that if he did sell it, then any contract must be subject to such sale. On July 15, the next day the defendant wrote as follows:

"We have your telegram reading as follows: 'Will contract your requirements egg coal at $6.50 net ton mines, subject conditions in letter today.'

"We note you say you are forwarding contract and price will be $6.50 net at the mines, subject to conditions in letter of same date.

"We would like to have you ship us our full amount of coal right along, also the balance of cars which are still due us on the old contract. Please let this coal come along as soon as possible, also your contract.

Yours truly,
FAIRMONT GLASS WORKS
Per John Rau, President."

On the next day, July 16 (page 81) before he had received any reply, he writes again:

"We would like for you to ship our coal at the same amount per month as we have been ordering according to our old contract, and as advised in telegram today. I will be there Monday, the 19th, and would

like to meet your Mr. Deegans and close up the deal.

"We are sorry to hear that the contract will have to be cancelled in case the company is sold. Certainly we will have to take our chances on this, but we would like to have at least sixty days leeway in case the company was sold, as we are paying a good price for coal and the party who buys your company should surely be willing to carry us along at least sixty days to give us a chance to get coal elsewhere."

From the above it will be seen that on the 15th of July after he had received the price and the new condition which was to be added to the contract (a form of which he already had and with which he was familiar) Mr. Rau writes:

"Please let this coal come along as soon as possible, also your contract," and on the next day, July 16, he says he will be there Monday 19th and "would like to meet your Mr. Deegans and close up the deal." He did go to Huntington on the 19th and closed up the contract as he anticipated. The above correspondence shows that Rau was very anxious to obtain a contract with the plaintiffs and that he had fully made up his mind to enter into it before he ever left Indianapolis, that is on the 15th and 16th of July. According to his own testimony and the only testimony as to the misrepresentation that the Deegans Company owned the mines was made on the 19th after he came to Huntington. If it were ever made, it had no part in inducing him to enter into the contract, for he had previously determined to contract with the W. E. Deegans Coal Company and was in fact very anxious and the disturbance

in Mr. Rau's mind was whether the Deegans Coal Company would give him a contract. So far from the Coal Company inducing Mr. Rau or attempting to induce him to do anything, he was all the time anxiously and persistently pursuing them beseeching a contract. He made the advances all the way. This evidence is furnished by his own written letters and conclusively shows that the alleged representations were not any inducement, even if they were made. Therefore, there was no substantial issue upon misrepresenation to be submitted to the jury.

In **Southern Development Co. v. Silva,** 125 U. S. 249, 250, the court said: "The burden of proof is on the complainant; and unless he brings evidence sufficient to overcome the natural presumption of fair dealing and honesty, a court of equity will not be justified in setting aside a contract on the ground of fraudulent representations. In order to establish a charge of this character the complainant must show by clear and decisive proof . . . . Fifthly, that it was acted on by complainant to his damage." This is of course the general rule. **Schugan v. Scott,** 162 F. 209 (CCA8); **Brandon v. McCausland,** 171 F. 402, (CCA8). And where a party fails to prove that he would have acted otherwise had he known the facts he can not have any relief upon the ground of fraud. In **Ming v. Woolfolk,** 116 U. S. 599, 602, 603, the court said: "So far, therefore, as the case made by the declaration is to be considered as an action to recover damages for a deceit practiced by the defendant, it amounts to this, that the defendant, by his false representations, induced the plaintiffs to do something which they would have done anyhow, and by which they sustained no loss, but on the contrary

were greatly advantaged. 'The requisites to sustain an action for deceit,' says Baron Parke, in **Watson v. Poulson,** 15 Jurist, 1111, are 'The telling of an untruth, knowing it to be an untruth with intent to induce a man to alter his condition and his altering his condition in consequence, whereby he sustains damage'."

It is true that Mr. Rau says that when he took the contract for the year previous, he stated to the representative that he would not contract with a broker or owners; and that the man said: "We own the mines." owners; and hat the man said: "We own the mines." This representation that "we own the mines" cannot be made the basis of any charge of fraud. The Cub Fork Coal Company and the Paragon Coal Company owned the mines and at that time there was in existence the two written contracts constituting the W. E. Deegans Coal Company the exclusive sales agent of the owners (page 109-110). The language of these contracts is: "The seller hereby constitutes and appoints the W. E. Deegans Coal Company its sole agent to sell and agrees to ship to or on orders of the agent the entire output of its mines . . . . " The W. E. Deegans Coal Company was thus authorized to enter into contract binding on the two principals, and its representative was equally the representative of the two mine owners. The Fairmont Glass Works even as a technical matter thereby obtained a contract with the mine owners, and could have sued them thereon. **Darrow v. Horne Produce Co.** 57 F. 463; **Moore v. Sun P. and P. Co.** 101 F. 591, 183, U. S. 642; **Curtis v. Miller** 73 W. Va. 481, 1 Minor Inst. 236; **Johnson v. Hoover,** 72 Ind. 397. Fraud is dishonesty, and certainly no charge of dishonesty can be based upon this statement. Furthermore, we find

that whenever Mr. Vass who conducted the correspondence for the W. E. Deegans Coal Company had occasion to refer to the separate ownership, he did so frankly and without any thought that there was anything to conceal. Thus, in his letter of July 10, he states that Mr. Deegans "who has charge of the operating companies" is out of town and in the letter of November 1, he states that he has taken up the question of increase with the "mine" and they have agreed to waive it.

No charge of fraud can be based upon this statement that "We own the mines," and the claim of the defendant must come back to the alleged statement of July 19 that the W. E. Deegans Coal Company owned the mines. The defendant does not claim that this statement was ever made at any other time or place. The representative in taking the first contract did not state that the W. E. Deegans Company owned the mines, even according to the testimony of Mr. Rau, but simply that "We own the mines," which was technically and substantially true.

The defendant with knowledge that the W. E. Deegans Coal Company was not the owner of the mines (having such knowledge both before and after the signing of the contract) elected to proceed and waived the misrepresentation, if any. A second answer to the alleged misrepresentation of the ownership of the mines is found in the fact that the defendant with full knowledge elected to proceed.

In the letter of November 1, 1920, it was said: "We have taken the matter of increase in cost up with the mine and they have agreed to waive the privilege ac-

corded them in clause 'D' and make no advance on this as a result of the wage increase effective September 1."

This letter was written by the W. E. Deegans Coal Company to the defendant which thereafter called for further shipments. Upon this, the present trial, the plaintiffs introduced new and important evidence in addition to the letter of November 1, upon which the court then passed, which new evidence together with the old, in our opinion leaves this question no longer open. In the letter of July 10, 1920, (page 78) from the W. E. Deegans Coal Company to the defendant written in reply to the defendant's letter of July 7, it is said: "Mr. Deegans **who has charge of the operating companies,** is out of the city at the present, but will return tomorrow and we will advise you Monday . . . . " Mr. Rau was then dealing with the W. E. Deegans Coal Company, which to his knowledge, sold coal. Here he is advised that the operating companies are different. "Operating companies" in this connection, could have meant nothing except something in contra-distinction to the selling company; that is, a mining company. This is the natural meaning of the word and the circumstances at the time but emphasized it. This information in no way shocked the president of the defendant; nor, can it be claimed that he overlooked it, for he says in the letter of July 12 (page 79): "We note that your Mr. Deegans who has charge of the making of contracts is out of the city . . . . " Here Mr. Rau is given information which he reads that there are operating companies different from the company with which he has been dealing and from which he is buying coal; that is, the W. E. Deegans Coal Company. It can hardly be argued he can understand anything other than a mining com-

pany, and in his letter of July 12, he shows that he understands that Mr. Deegans who has charge of the operating companies, must also be consulted about the contracts for he says: "Your Mr. Deegans who has charge of the making of contracts . . . . "

In **Simon v. Goodyear Metalic Rubber Shoe Co.** 105 F. 573, 581, Judge Lurton, speaking for the Circuit Court of Appeals for the Sixth Circuit, said: "But full knowledge of a fraud does not mean that the party defrauded shall have knowledge of all of the evidence tending to prove the fraud. If he have knowledge of the material facts which go to make up the case of deceit as practiced upon him, it is sufficient to make him elect whether he will go on with the contract, or stop short and sue for the loss he has already suffered."

The foregoing confirms the propriety of the judgment of the Circuit Court of Appeals in limiting the new trial to damages. The written correspondence furnished by the defendant itself shows that its only defense, that of misrepresentation, was untenable: First, because the alleged misrepresentation was not any inducement to entering into the contract, and secondly, that with full knowledge defendant elected to proceed and to call for continued performance of the contract; and thereby waived the fraud—if any.

There was, therefore, nothing substantial in the way of defense to be submitted to the jury except a counter-claim, and this the Circuit Court of Appeals has left open. Be that as it may, however, the jury by its finding for the plaintiff negatived the alleged defenses. It is therefore respectfully submitted that the

judgment of the Circuit Court of Appeals should be affirmed.

O. J. DEEGAN.
CONNOR HALL.

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